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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner & Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents & Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE JAPAN EXTERNAL TRADE ORGANIZATION AS AMICUS CURIAE

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The Japan External Trade Organization ("JETRO") submits this brief as *amicus curiae* in support of the position of petitioner and cross-respondent, Sumitomo Shoji America, Inc. This brief is filed with the written consent of the parties pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

JETRO is a non-profit organization incorporated under the laws of Japan and owned by the Government of Japan. It was established in 1958 under a special law for the purpose of facilitating and promoting Japan's trade relations with other countries. JETRO maintains offices in the United States and throughout the world. Its activities include market research, data dissemination, export and import promotion, and overseas public relations work. In recent years JETRO has considerably expanded the scope of its efforts in regard to international economic cooperation, import promotion and overseas investment. Through its activities JETRO has acquired considerable knowledge and experience with respect to Japanese direct investment in the United States that may assist the Court in its consideration of this case.

INTRODUCTION

JETRO is concerned about the implications of the instant case for the future of Japanese direct investment in the United States. Specifically, JETRO fears that an affirmance of the decision of the court below will tend to discourage such mutually beneficial investment insofar as that decision imposes the strictures of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1978) (hereinafter "Title VII") to limit the right of Japanese investors to control and manage their enterprises in the United States with home country executive personnel of their choice, as authorized by Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953) (hereinafter the "Treaty"). The primary purpose of the present brief is to provide the Court with factual information regarding Japanese direct investment in the United States and to demonstrate how the decision of the court below imperils the future of such investment in direct contradiction of the Treaty's overall purpose.

SUMMARY OF ARGUMENT

The instant case is of direct concern to Japanese investors because of its potential impact on their ability to control and manage their enterprises in the United States with home country executives and other specialists of their choice. The decision of the court below is incompatible with the Treaty's overall purpose of encouraging foreign direct investment and will likely have a chilling effect on future Japanese investment in the United States. Private sector direct investment in the United States by Japanese investors has grown rapidly in recent years, increasing from $152 million in 1973 to some $4.2 billion as of the end of 1980. JETRO believes that Japanese direct investment in the United States, which has been actively encouraged by U.S. federal and state government officials, has been of substantial mutual benefit to the United States and Japan. Among other things, this private investment helps lessen trade friction, and has led to hundreds of thousands of new jobs for American workers.

An interpretation of the Treaty that gives plenary effect to Article VIII(1) is entirely compatible with the policies underlying Title VII and will not foster employment discrimination by U.S.-based Japanese concerns. The overly broad reading of Title VII by the court below improperly and unnecessarily limits the right of Japanese investors to employ Japanese key personnel of their choice as provided by the Treaty, and thus imperils the basis for mutually beneficial foreign direct investment in the United States.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW IS INCOMPATIBLE WITH THE TREATY'S OVERALL PURPOSE OF ENCOURAGING FOREIGN INVESTMENT AND THUS IMPERILS JAPANESE DIRECT INVESTMENT IN THE UNITED STATES WITH ADVERSE CONSEQUENCES FOR THE AMERICAN ECONOMY.

The treaty at bar is one of a series of friendship, commerce and navigation ("FCN") treaties designed to encourage and facilitate foreign private investment in the host country. One of the chief architects of the modern FCN treaty has written:

> In a real sense . . . the FCN treaty as a whole *is* an investment treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total "climate" in which it is to exist.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 244 (1956).

From the point of view of the United States, the overall purpose of the Treaty is to promote and protect private American investment in Japan. *See* 99 Cong. Rec. 9312 *et seq.* (1953). At the same time, because of the reciprocal nature of FCN treaties, *see id.* at 9312-13, the Treaty's overall purpose necessarily includes the promotion of Japanese private investment in the United States.

The Fifth Circuit recognized the Treaty's intent to promote Japanese investment interests as "self-evident", concluding that the goal of American negotiators in formulating Article VIII(1), *i.e.* to safeguard the right to free choice of technical

and managerial personnel in order to maintain control of private investments abroad, was also "the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States." *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, 362 (5th Cir. 1981). The court below likewise noted that the Treaty "is a commercial agreement designed to encourage trade and investment in the United States and Japan." *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552, 554 (2d Cir. 1981). Its holding, however, tends to frustrate that design by undercutting the ability of Japanese investors to control the key personnel who manage their investments in the United States. As the following discussion shows, the chilling effect on Japanese direct investment in this country will be widespread—as will the adverse consequences for the American economy, which derives substantial direct and indirect benefits from such investment—if this Court adopts the holding of the court below.

A. The Accelerating Pace of Japanese Direct Investment

A recent study by the Japan Economic Institute of America indicates that Japanese investors had a controlling investment in 213 U.S. manufacturing companies at the end of 1980. *See* S. MacKnight, *Japan's Expanding Manufacturing Presence in the United States: A Profile,* 2 (Japan Economic Institute of America [1981]) (hereinafter cited as the "JEI Profile"). At that time, U.S. manufacturing companies owned by or affiliated with Japanese investors (including companies in which Japanese investors held a substantial minority interest) had a total of 314 plants in operation or under construction. *Id.* The vast majority of these U.S. companies are owned entirely by one or more Japanese corporations, either directly or indirectly through another U.S. affiliate.

The growth of Japanese direct investment in the United States is a relatively recent phenomenon. At the time the Treaty was concluded, per capita income in Japan was a mere $188 per annum, lower than that in many developing countries. *See*

Patrick and Rosovsky, *Japan's Economic Performance: An Overview,* in H. Patrick and H. Rosovsky, *Asia's New Giant: How the Japanese Economy Works,* 11 (The Brookings Institution, 1976) (hereinafter cited as *"Asia's New Giant"*). The Japanese nation focused its concern on basic subsistence and on the reconstruction of basic industries devastated by World War II. At the time negotiations for the Treaty began, Japan was still under Allied occupation, a status which did not terminate formally until April 28, 1952. *See id.* The United States was, of course, the dominant occupying power and the dominant factor as well in Japan's external economic relations. *See* W. Hunsberger, *Japan and the United States in World Trade,* 51 (Council on Foreign Relations, 1964). In 1952, the United States provided approximately two-thirds of Japan's imports, *id.,* and American private investment accounted for some 70 per cent of total foreign investment in Japan. Hearing before the Subcommittee on Commercial Treaties of the Committee on Foreign Relations, United States Senate, 83d Cong., 1st Sess. 27 (1953). It was only in 1964 that Japan received "developed country" status as a member of the Organization for Economic Cooperation and Development. *See* Krause and Sekiguchi, *Japan and the World Economy,* in *Asia's New Giant,* at 426. As late as 1973, Japanese direct investment in the United States totalled only $152 million. Japan External Trade Organization, *Japanese Manufacturing Operations in the United States,* 8 (1981).

Since 1973, however, the growth of Japanese investment in the United States has been significant. A recent study by JETRO shows that Japanese direct investment in the United States grew to a total of $4.2 billion by the end of 1980—a 28-fold increase in seven years. During the same period, Japan's share of the world's total direct investment in the United States rose to 6.4 per cent from 0.7 per cent. While Japan's share of U.S. investment in 1980 still trailed that of such long-established investor nations as the Netherlands (24.7 per cent) and the United Kingdom (17.3 per cent), it exceeded that of Switzerland (5.6 per cent) and France (4.1 per cent) and

continues to grow at an accelerating pace. U.S. Department of Commerce, *Survey of Current Business* (August 1980), *cited in Japanese Manufacturing Operations in the United States, supra* at 8-9 (hereinafter cited as the "JETRO Survey").

There are several reasons for this rapid increase in Japanese direct investment in the United States. Most notably, some firms which formerly did business in the United States only by export activities have transferred manufacturing and other business operations here because of business considerations such as the prospect of assuring supplies of raw materials and parts, convenience to markets, and the ability to upgrade repair and after-sales service. JETRO Survey at 22-23. Moreover, with the rapid increase in Japanese wages and other manufacturing costs over the past decade, the differential between overall manufacturing costs in Japan and in the United States has narrowed. This narrowed differential in costs, together with the continued appreciation of the yen, has facilitated direct investment. JETRO Survey at 9, 11.

In many cases, the principal factor motivating Japanese direct investment in the United States has been concern about trade frictions and, in specific cases, limitations on the importation of various Japanese manufactured products, including, for example, color television sets and automobiles. JEI Profile at 2. It is JETRO's experience that Japanese firms have received strong encouragement and, in some cases, considerable pressure from state and federal officials in the United States to establish manufacturing subsidiaries in this country. *Cf.* JETRO Survey at 60-62. In an effort to maintain sound and healthy economic relations with the United States, Japanese firms have been responding to such encouragement in a very positive way, as the direct investment figures show.

JETRO firmly believes that Japanese direct investment in the United States is of great benefit to both countries. As the Assistant Secretary of the United States Treasury for International Affairs noted in recent testimony before the Congress:

> U.S. policy traditionally has welcomed to the United States foreign investment that enters our economy in response to market forces. In our opinion, this open investment climate has served us well. Throughout our history foreign investment has created jobs for U.S. workers, broadened U.S. capital markets, and contributed to U.S. productivity and economic growth. At the present time, investment in the United States, both foreign and domestic, is critical to the revitalization of our economy.

Statement of the Honorable Marc E. Leland, Assistant Secretary of the Treasury for International Affairs, before the Subcommittee on Commerce, Consumer and Monetary Affairs, Committee on Government Operations, House of Representatives, *quoted in* Treasury News, 1 (September 23, 1981). An interpretation of the Treaty which gives the full intended effect to the free choice provision of Article VIII(1) will foster a climate in which foreign investment can continue to flourish.

B. Direct and Indirect Employment of Americans As a Result of Japanese Investment

The growth of Japanese investment in the United States results in substantial direct and indirect benefit to the American economy. One factor of crucial interest to both Americans and Japanese is the positive effect of Japanese-owned enterprises on the employment of American citizens. A 1979 study for the Japan Society conducted by the Columbia University Conservation of Human Resources Project found that in 1978, Japanese-owned enterprises in the United States employed approximately 10,500 Japanese nationals and provided jobs directly for approximately 81,300 Americans—a one-to-eight ratio. Japan Society, Inc., *The Economic Impact of the Japanese Business Community in the United States, 1979,* 1-2 (Public Affairs Series 10) (hereinafter cited as *"Economic Impact"*). Furthermore, the operations of those enterprises result in an estimated additional 261,000 jobs for American workers. *Id.* at 1, 34-36. Since 1978, the number of new

Japanese manufacturing facilities in the United States has grown. *See* JETRO Survey at 19. The number of Japanese-owned manufacturing facilities beginning production in the United States each year rose from 15 during 1977 and 18 during 1978 to 31 during 1979 and 30 during 1980. JEI Profile at 2. Thus, it may be inferred that the number of Japanese-created jobs for American citizens has risen significantly since 1978.

Although the number of Americans directly employed by Japanese general trading companies in the United States is limited (some 4,800 non-Japanese as against some 3,300 Japanese were employed in such entities in 1978), *see Economic Impact* at 10, 20, the Columbia University study points out that Japanese general trading companies account for the indirect employment of some 143,300 Americans through the $3.9 billion in American exports which they handle. *Id.* at 34. Thus Japanese general trading companies in the United States have had a multiplier effect on the employment of Americans on the order of 44 to 1.

The ratio of Americans to Japanese directly employed by Japanese-owned firms varies considerably from industry to industry. In manufacturing firms, the number of American employees at both the blue collar and the executive levels is very high compared to the number of Japanese, a ratio of 28 to 1. *Economic Impact* at 21. In the case of general trading companies (*sogo shosha*), the ratio is lower (1.4 to 1). *Id.* The reason for this is not only that blue collar workers generally are not needed in such organizations, but also that local nationals do not have the special training and knowledge required for managerial and other key positions. Executives qualifying for these positions must understand sophisticated questions of international trade, finance, transportation and investment; they must know the Japanese market, customers, goods, culture and language, and they must be familiar with the company's headquarters and with the worldwide organization; they must have the knowledge necessary to carry on constant liaison with the home office and with customers through computer-

controlled communications systems connected with their headquarters and their affiliated offices. *See generally,* Krause and Sekiguchi, *Japan and the World Economy, supra* at 389-96.

The foregoing statistics dramatize the positive impact that Japanese enterprises of all kinds in the United States have had on the employment of American citizens. The decision of the court below would dilute that impact by discouraging Japanese direct investment. By construing Article VIII(1) of the Treaty as granting all such enterprises the right to hire the personnel of their choice for key positions, this Court can assure that the investment-fostering purpose of the Treaty is fully realized, to the maximum intended benefit of the American domestic economy.

II.

AN INTERPRETATION OF THE TREATY THAT GIVES PLENARY EFFECT TO ARTICLE VIII(1) IS ENTIRELY COMPATIBLE WITH THE POLICIES UNDERLYING TITLE VII AND WILL NOT FOSTER EMPLOYMENT DISCRIMINATION BY U.S.-BASED JAPANESE FIRMS.

The case before the Court is of direct concern to all Japanese foreign investors and doubtless to many other present and potential foreign investors in the United States. At issue is the relationship between two distinct and important sets of public policies: those favoring the liberal flow of international trade and investment between the United States and its treaty partners, and those concerned with the elimination of employment discrimination in American society. JETRO believes that these two sets of policies are entirely compatible and that there is no necessity for this Court to favor one to the detriment of the other.

Seen in proper perspective, the realities of Japanese enterprise militate against any danger of discrimination against non-Japanese nationals as a result of giving plenary effect to the free choice provision of Article VIII(1) of the Treaty. First, it should be noted that only a small percentage of the employ-

ees at Japanese-owned manufacturing affiliates are Japanese nationals sent from parent companies. Thus, among 175 such U.S. concerns polled by JETRO in 1980, only 1,126 of the employees, or 2.5 per cent, were Japanese. JETRO Survey at 37. Moreover, those U.S.-based firms that engage a higher percentage of Japanese personnel generally do so only during the initial phase of their American existence, and the tendency is to reduce the number of such personnel once normal production is under way. *Id.* at 38. Japanese personnel are concentrated in second-level managerial positions, where they provide assistance to top management on matters of finance, production and technology; other such personnel are sent from the parent company on a temporary basis, for example, to give technical advice during busy seasons or under other special circumstances. *Id.* at 37.

There is no evidence that the use of Japanese personnel in a limited number of specialized positions works to exclude or to reduce the number of American citizens from Japanese enterprises in the United States. On the contrary, the trend appears to be running in favor of increased hiring of American personnel for the top management positions of such enterprises. The JETRO survey of Japanese firms indicates a conviction among such firms that highly experienced American executives, who are perceived as strong leaders by American workers, are preferable to Japanese executives for the top management positions of American-based firms. *See* JETRO Survey at 67. Additionally, the prospect of discrimination against American personnel becomes even more remote in view of the documented concern of Japanese firms for maintaining harmonious relations with local communities, a concern which has been exhibited by activities such as participation in local volunteer activities, contributions to public welfare projects and schools, and the active recruitment of handicapped individuals. *See id.* at 62-63.

The notion that a liberally construed Article VIII(1) could be used to favor Japanese nationals over American personnel in a discriminatory manner pales in the face of the careful screen-

ing process employed by U.S. consular officials in Japan before issuing visas to non-immigrant treaty trader executives. It is JETRO's understanding that, in making the determination as to whether such a Japanese national may enter the United States, the American visa-granting authority considers such matters as the job title involved, the level of compensation, the location of the job within the structure of the employing company, the nature of the duties involved, the degree of control and responsibility that the candidate will exercise, the number and skills of the candidate's prospective subordinates, and the present level of the candidate's executive or supervisory skills. *Cf.* 8 U.S.C. § 1101(a)(15)(E)(i) (1970); 22 C.F.R. § 41.40(a), (b) (1981). Clearly, then, there is adequate protection to assure that the granting of treaty trader status to Japanese nationals is confined to the special categories of managerial and technical personnel enumerated in Article VIII(1) of the Treaty.

Finally, in JETRO's view, the court below erred by making Title VII applicable to personnel covered by Article VIII(1) of the Treaty because, as a matter of law, the standards of Title VII do not apply to the grant of treaty trader status. This Court has previously held that, while Title VII prohibits discrimination based upon national origin, a hiring practice that is based upon nationality does not run afoul of Title VII. *See, e.g., Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). The preference for home-country personnel allowed by Article VIII(1) is based solely on nationality and does not amount to invidious discrimination based on national origin.

The decision of this Court in the case at bar will have a significant impact on the future of Japanese and other foreign direct investment in the United States. The executives whose jobs are placed in question by this case are non-immigrant Japanese nationals who enter and are employed in the United States on the basis of treaty trader visas authorized by the reciprocal provisions of the FCN treaty between the United States and Japan. An interpretation of Title VII which would limit the right of Japanese companies to send such key person-

nel to manage investments made here—whether in branch or subsidiary form—appears to go far beyond the purpose of Title VII. The heart of the matter, seen from the point of view of a potential foreign investor, is whether, based on an expansive and unintended reading of Title VII of the Civil Rights Act of 1964, foreign investors will lose the right to manage and control their foreign investments with key personnel of their choice and become obliged to appoint to executive or specialist positions persons of any nationality who claim they are "qualified" for such positions. Such a loss of control would without doubt dampen substantially the willingness of foreign firms to do business in the United States through local establishments.

CONCLUSION

For all of the foregoing reasons, the judgment of the court below should be reversed.

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